

ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED SEPTEMBER 18, 1991)
(REVIEW REQUESTS DUE 10-10-91)
(REPLIES DUE 10-25-91))

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1695(F)

WILLIAM R. ADAIR

v.

PENN-NORDIC LINES, INC.

Complainant, an owner of a motorcycle, engaged a freight forwarder to arrange to ship the motorcycle to complainant's son in New Zealand. The unlicensed freight forwarder selected a non-vessel operating carrier (NVOCC), operating at the time without a tariff on file, to carry the shipment. The freight forwarder delayed payment of freight money entrusted to it with the result that the NVOCC abruptly terminated the shipment by placing the motorcycle in a warehouse where it has been accumulating storage charges, although the NVOCC had issued an on-board bill of lading. Neither respondent will pay the storage charges for the complainant, although the NVOCC at one time appeared to agree to do this, and the forwarder offers to pay some of the charges. Each respondent blames the other for the problem. Complainant alleges that both have acted unreasonably and asks for compensation for financial injury caused by respondents' alleged misconduct. It is held:

- (1) Both respondents have acted unreasonably and in violation of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1709(d)(1) and should be held fully accountable for the injury they have caused;
- (2) Respondent NVOCC abruptly terminated the shipment, although issuing an on-board bill of lading, reneged on its agreement to move the shipment and to absorb the storage charges, and retained freight money although not performing the service, and neglected to notify the cargo interests as to what it had done;

- (3) Respondent freight forwarder failed in its fiduciary duty to the shipper by selecting an unreliable, non-tariffed NVOCC, delaying payment of freight, misleading the shipper as to the whereabouts of the motorcycle, and otherwise failing to secure the release of the motorcycle in the shipper's interests;
- (4) Reparations for financial injury suffered by complainant awarded in the total amount of \$3,648.30, plus interest.

William R. Adair for complainant.

William Sherwood and *Robert L. Thordarson* for respondent Corporate World International.

Wilfred Garcia for respondent Penn-Nordic Line.

**INITIAL DECISION¹ OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE**

This is a case in which an innocent shipper entrusted his money and goods to two companies engaged in the transportation business, which companies, through their misconduct or negligence, caused the shipper financial injury. Because of the shipper's unfamiliarity with relevant law and his rights, it was some time before his complaint was filed with the Commission. However, as this record shows, the shipper has waited long enough for relief, and it is hoped that this initial decision will move the matter along toward a successful conclusion for him.

The case began with the filing of a complaint by Mr. William R. Adair, which was served on respondent Penn-Nordic Line,² a non-vessel operating common carrier by water (NVOCC) on April 12, 1991. The complaint was originally filed under the Commission's

¹This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 318, Rules of Practice and Procedure, 46 CFR 502.318).

²The correct name of respondent is Penn-Nordic Line according to the pleadings filed by respondent, or Pennsylvania Nordic Line, according to the Commission's records. According to a tariff which was filed by Penn-Nordic, effective March 18, 1990, Pennsylvania Nordic Line was the trade name of Garcia-Mohawk, Inc. On October 12, 1990, a tariff supplement was filed with the Commission stating that Garcia-Mohawk, Inc. was no longer doing business as Pennsylvania Nordic Line but as Del Rey Transport Line, which adopted the previous tariff. (See Del Rey Tariff, FMC No. 1, Supplement No. 1, Adoption Notice, October 12, 1990, filed with the Commission's tariff office.)

informal, small-claims procedure (Subpart S, 46 CFR 502.301 et seq.) but was transferred to the formal procedure for small claims (Subpart T, 46 CFR 502.311 et seq.) because of the unusual nature of the complaint and with no objection by the parties.

The complainant, Mr. Adair, filed the complaint on behalf of himself and his son, William R. Adair, Jr. Essentially complainant alleged that Penn-Nordic Line had failed to transport a motorcycle which Mr. Adair had purchased for his son, who was living in New Zealand, although the motorcycle had been booked for shipment with Penn-Nordic some time in December 1989 through a freight forwarder known as Corporate World International. Complainant alleged that he paid freight in full, which payment was remitted by Corporate World to an attorney in Pennsylvania representing Penn-Nordic. This attorney acknowledged payment of freight and purported to arrange for the shipment to take place and to place freight money in escrow until that had happened. However, it was alleged, Penn-Nordic did not arrange to transport the motorcycle to New Zealand. Instead, Penn-Nordic placed the motorcycle in a warehouse in Oakland, California and abandoned it without notifying complainant or any of complainant's agents. When the motorcycle did not arrive in New Zealand, William Adair, Jr., the consignee, filed a claim with an insurance company, which located the motorcycle in the warehouse and consequently did not pay the claim. Complainant followed up on this information through the forwarder, Corporate World, and learned that payment of freight had been made to Penn-Nordic's attorney in Pennsylvania but that Penn-Nordic did not thereafter arrange to ship the motorcycle. Instead, the motorcycle was being held by the warehouse in Oakland which would not surrender it until it was paid for storage charges which continued to accrue.

Because of Penn-Nordic's failure to carry and the retention of the motorcycle in a warehouse pending payment of storage charges, complainant asked for relief in the form

of \$4,623.30 in damages if the motorcycle is not delivered to his son in New Zealand. Alternatively, complainant asked for the motorcycle to be released from the warehouse and shipped to New Zealand at Penn-Nordic's expense and for additional items of expense.

Under the relevant Commission rules of procedure (46 CFR 502.312), respondent Penn-Nordic was supposed to file its answer by May 7, 1991. However, respondent failed to do so, although served with the complaint and the customary letter of explanation by the Commission's Secretary regarding the duty of respondents to file answers and despite the fact that the Commission's Assistant Secretary, Mr. Ronald Murphy, had established telephonic contact with Penn-Nordic's representative, Mr. Wilfred Garcia. (See Notice of Respondent's Default, etc., May 14, 1991, at 3.) Under the Commission's rules (46 CFR 502.64(b)), when a party fails to file and serve an answer to a complaint within the time provided, the presiding officer "may enter such rule or order as may be just. . . ." Accordingly, I notified Penn-Nordic that it was in default and should show cause why judgment should not be entered against it. (See Notice of Respondent's Default, cited earlier.) I also advised Penn-Nordic that the complaint, which had not specified provisions of the Shipping Act of 1984, constituted a complaint that three provisions of that Act could have been violated, namely, sections 10(b)(6), 10(b)(12), and 10(d)(1), relating to unfair practices regarding loading of freight and settling claims, undue prejudice to any person, and unreasonable regulations and practices relating to receiving, handling, storing, etc., of property.³ Complainant was also instructed to supplement the record as regards certain items of alleged damages. (*Id.* at 6-7.)

³I explained in the rulings cited that the original complaint had not specified which provisions of the Shipping Act of 1984 had allegedly been violated. However, because of the informal nature of the proceeding and lack of counsel and in order to save time, I advised respondent that the facts alleged in the complaint, if true, could arguably show violations of the three sections of the 1984 Act cited above. I cited case law holding that administrative agencies and even courts are lenient toward inexperienced litigants and will construe complaints broadly to determine what complainants are trying to say under relevant laws. (See rulings cited at 5 n. 2, citing, among other cases, *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Elliott v. Bronson*, 872 F.2d 20, 21, (2d Cir. 1989); *European Trade Specialists, Inc. v. PGL, Inc. et al.*, 19 F.M.C. 148, 151 (FMC 1976).)

After service of the above notice of default, it came to my attention that Penn-Nordic had replied to the complaint by a letter which was received by the Commission's Secretary on May 14, 1991, together with a backup "brief," both dated April 30, 1991. The documents did not contain a certificate of service showing that they were served on complainant nor when they were mailed and they were not verified before a notary public, in violation of the Commission's rules. (See 46 CFR 502.312; 502.112(b); 502.114).) However, in order to move the case along and because of the informal nature of the proceeding and the fact that the parties were not represented by counsel, I arranged to have Penn-Nordic's replies served on complainant, ordered Penn-Nordic to correct the deficiencies, and permitted complainant to reply to Penn-Nordic, as the rules envision in Subpart T proceedings. (See Notice of Further Orders Issued in Regard to Late Filing of Reply by Respondent, May 16, 1991.) Respondent was specifically advised that it must furnish factual statements under oath, i.e., sworn before a notary public, so that they could be considered as evidence even under the relaxed rules of evidence followed by administrative agencies. (*Id.* at 2-3.) Respondent later corrected its earlier findings by obtaining proper verifications before a notary public and explained that it filed its answers late because the relevant file was not in its possession. (See letter from Mr. Wilfred Garcia addressed to Judge "Klein," dated June 3, 1991.)⁴

As authorized by the Subpart T procedure, complainant, Mr. Adair, filed his responses to Penn-Nordic together with supplemental evidence regarding specific items of alleged injury. (See his replies, dated June 5, 1991.) In addition, complainant specified the

⁴Mr. Garcia, on behalf of Penn-Nordic, stated that he had filed his answer to the complaint late because "we were looking for the file which pertained to informal Docket No. 1695 F which is not in our possession." He stated further that the file was in the possession of the Attorney General's office of Pennsylvania, which, he stated, was planning to sue Corporate World. (See letter dated June 3, 1991, cited above.)

provisions of the 1984 Act that he was claiming had been violated, namely, sections 10(b)(6) and 10(d)(1), relating to the practices of carriers in loading freight and handling claims and in receiving, handling, storing, and delivering property.

In order to help the parties complete the evidentiary record and evaluate their respective positions, I issued detailed rulings based on my preliminary evaluation of the evidence and pleading submitted by the parties and afforded them opportunity to supplement and clarify the record in certain respects. (See Notice of Preliminary Evaluation of the Evidence and of Opportunity to Supplement the Record, June 14, 1991.) I explained that the case was unusual because it involved a claim by a shipper or cargo owner that a carrier had failed to carry, which is a claim not usually heard by the Commission under the shipping acts but rather one usually heard in courts under contract or admiralty law. Also, it appeared that a significant participant in the failed motorcycle shipment, Corporate World International, the freight forwarder, had not been named as a respondent, although the record suggested that Corporate World had played a large role in the transportation foul-up and should be held accountable to the shipper. Thus, it appeared that Penn-Nordic had aborted the shipment by placing the motorcycle in a warehouse and had retained freight money without arranging to transport the motorcycle to its destination and had even operated at the time of the booking without a tariff on file. However, Penn-Nordic had apparently been experiencing difficulties with the forwarder, Corporate World, which had been late in payments of freight, and, furthermore, according to Penn-Nordic, Corporate World had been responsible for much of the problem by misdescribing the shipment and by failure to furnish other shipping documents.

As of June 14, 1991, the time of the rulings cited above, it appeared therefore that someone in addition to the named respondent, Penn-Nordic, might have been responsible

in whole or in part for the shipper's problems and injuries and that a proper decision could not be reached without the participation of the other person, namely, the freight forwarder, Corporate World, who could answer the various charges made against it by Penn-Nordic. In its replies to the complainant, Penn-Nordic had charged that Corporate World had not only operated as a freight forwarder without a license, which would be a violation of section 19(a) of the 1984 Act (46 U.S.C app. sec. 1718(a), but had also acted improperly by misdescribing the subject shipment, by failing to pay freight promptly, and by failing to perform other duties properly. Accordingly, I advised the parties that under the record as limited at the time, I could possibly find Penn-Nordic in violation of section 10(b)(6) or 10(d)(1) of the 1984 Act at the least for retaining freight money without performing the paid-for service. However the alleged monetary damages appeared quite possibly to have been caused also by Corporate World, which was not named as a party in the complaint. To cure this problem, the complainant could sue Corporate World in a court of law on a contract, tort, or agency theory and could conveniently do so in a state court in Washington State where the shipper and Corporate World resided. Alternatively, it was suggested that the shipper could amend his complaint before the Commission to name Corporate World as a freight forwarder whose conduct allegedly violated section 10(d)(1) of the 1984 Act.

In response to the rulings and evaluations discussed above, the complainant, Mr. Adair, decided to file an amended complaint which was served on both Penn-Nordic and Corporate World on July 18, 1991. In the amended complaint, Mr. Adair added Corporate World as a respondent, alleged that Corporate World was a freight forwarder who handled the subject shipment and was paid freight money by the shipper through the shipper's agent, a company which assembled and crated the motorcycle for Mr. Adair. Mr. Adair alleged, furthermore, on the basis of telephone conversations with

Corporate World and the various charges made by Mr. Garcia of Penn-Nordic, that Corporate World had engaged Penn-Nordic to handle the motorcycle shipment as Mr. Adair's agent but that Corporate World had failed to furnish proper paper work to permit the exportation of the motorcycle and had arguably misdescribed the shipment to Penn-Nordic when preparing the shipping documents. Furthermore, it is alleged, Corporate World failed to forward Mr. Adair's money to Penn-Nordic in a timely manner and failed to notify Mr. Adair promptly that the motorcycle shipment had been aborted and that the motorcycle was accruing storage charges in a warehouse so that Mr. Adair could minimize expenses. Furthermore, it is alleged, Corporate World would have known of the problem with the motorcycle shipment as early as March 1990 but instead misled Mr. Adair's son, the consignee of the shipment, by advising him to file an insurance claim on June 1, 1990, and not advising him that the motorcycle had been located until July 25, 1990.

Mr. Adair sums up his case against Corporate World by stating as follows (amended complaint at page 3):

Corporate World International has injured claimant by failing to properly perform the services for which respondent was engaged and paid, i.e., properly classifying the shipment, preparing proper documentation, and advising claimant of the dispute with Penn-Nordic and the delay and added expense which resulted. They precipitated the generation of unwarranted storage charges by failing to forward payment to Penn-Nordic in a timely manner, and compounded the problem by concealing the situation from us, thereby depriving us of any opportunity to correct the situation before the storage charges had become exorbitant. It is complainant's contention that this constitutes an unreasonable practice connected with receiving, handling, storing, or delivering property, and as such it violates Section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1709(d)(1).

B. We further contend that both Corporate World and Penn-Nordic engaged in an "unfair practice in the matter of . . . adjustment and settlement of claims" as prohibited by Section 10(b)(6) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1709(b)(6). We are here interpreting "claims" to include those of one carrier against another, which should certainly not result in damage to an unwitting shipment owner who has made full payment.

Complainant goes on to plead that "Penn-Nordic and Corporate World each should be held financially responsible for whatever portion of the problem they caused."

Corporate World filed an answer to the amended complaint, which I received on August 1, 1991. This answer was in the form of a letter which bore no date and was not verified, i.e., it was unsworn and was signed by Mr. Bill Sherwood. It also did not show that a copy of the letter was served on the other parties to the proceeding. In order to correct these deficiencies, I arranged to make copies of the letter and to serve the other parties and furthermore instructed Corporate World to refile the letter showing verification, i.e., under oath before a notary public. (See Instructions Regarding Completion of the Evidentiary Record, August 6, 1991.) Corporate World was warned that failure to furnish the requisite verification would make the value of its evidence doubtful. Corporate World belatedly corrected the problem. Furthermore, Corporate World had not yet seen Penn-Nordic's answers to the original complaint, in which Penn-Nordic had made various charges against Corporate World, and Penn-Nordic had not yet had an opportunity to reply to Corporate World's letter. To cure these deficiencies and allow each respondent to reply to the charges made against it by the other respondent, I allowed each respondent to file written replies that were to reach me by August 30, 1991. (Complainant, Mr. Adair, was also permitted to reply to Corporate World's letter on the same day.) (See Instructions Regarding completion of the Evidentiary Record, cited above.) Only Mr. Adair filed any replies. Both Corporate World and Penn-Nordic have chosen to ignore my instructions and not to reply to the charges and statements made against them by each other. Moreover,

respondent Penn-Nordic has even refused several times to receive filings which Mr. Adair attempted to serve on Mr. Garcia by certified mail.⁵

After careful examination of the evidence submitted and the record as a whole, I conclude that Mr. Adair's allegations against both respondents Corporate World and Penn-Nordic are supported by the evidence and that both respondents engaged in unjust and unreasonable practices relating to the receiving, handling, storing, or delivering of property in violation of section 10(d)(1) of the 1984 Act (46 U.S.C. app. sec. 1709(d)(1)). I find, furthermore, that they are jointly and severally liable for the monetary injury inflicted on Mr. Adair as a result of their unreasonable conduct and that they should be promptly required, in a court of law, if necessary, to compensate Mr. Adair for the harm they have caused. I now explain.

The Evidentiary Record and Findings of Fact

The evidence in this proceeding has been developed in writing rather than by means of an oral, trial-type hearing. That is because the proceeding has been conducted under the more informal Subpart T procedure (46 CFR 502.311, et seq.) without objection of the

⁵See amended complaint, dated July 8, 1991, at para. C., page 4; see also final reply of Mr. Adair dated August 26, 1991, at para. 1. Mr. Adair explains in both these documents that Penn-Nordic refused to accept service by certified mail of Mr. Adair's amended complaint with supporting documentation as well as Mr. Adair's evidentiary submissions, dated June 5, 1991, with accompanying attachments. In the amended complaint, which was filed under oath, Mr. Adair states:

For Judge Kline's information, a copy of my last submittal was sent to Mr. Garcia by certified mail, return receipt requested, postmarked June 5, 1991. It was returned to us on July 1, 1991, having never been claimed, after the post office notified him four times, Mr. Garcia must think that if he ignores the problem it will just go away.

In his final reply, dated August 26, 1991, filed under oath, Mr. Adair stated:

Once again, Penn-Nordic has declined to accept the copies of my submittal of July 8. I am enclosing the complete envelope as it was returned to me, unopened, as evidence of this fact.

parties and with no request for an oral hearing. (See 46 CFR 502.315.) Also, because of the large distances separating the parties geographically, the relatively small amount of money in controversy, and the lack of legal counsel, a trial-type hearing was not practical. In any event, development of evidentiary records by means of written testimony and documentary evidence is an acceptable procedure, and indeed has long been encouraged by the Commission. (See *Avoidance of Trial-Type Oral Hearings*, Informal Statement of Policy, 17 SRR 457 (FMC 1977).)

The evidentiary record consists of sworn statements and supporting documents filed by the complainant, Mr. Adair. In addition, respondent Penn-Nordic made one filing consisting of an answer to the original complaint with a supporting "brief," which were originally filed in unsworn form but were later verified under oath, on my instructions. Respondent Penn-Nordic filed nothing else despite being served with materials charging Penn-Nordic with misconduct and being offered an opportunity to reply to such charges. Respondent Corporate World filed an undated, unsworn letter, later verified, with attachments but failed to respond to charges made by Penn-Nordic despite being given an opportunity to do so with specific instructions.⁶

The standard of proof in an administrative proceeding is that known as the "preponderance of the evidence," the lowest of three standards (the other two being "clear and convincing" evidence and evidence "beyond a reasonable doubt," the latter used in

⁶Corporate World was instructed to verify its replies to the amended complaint by verifying those replies, i.e., by swearing to them under oath before a notary public. (See Instructions Regarding Completion of the Evidentiary Record, August 6, 1991.) Corporate World was also instructed to file the verified replies so as to reach me by August 30, 1991, and was cautioned to serve them on the other parties. Despite these instructions, I received the verified replies on September 9, 1991, from the Commission's Secretary's office. They show no indication that copies were mailed to the other parties. Also, this time the replies are signed and sworn to by a Mr. "Robert L. Thordarson." The exact same replies without the oath were filed earlier by Mr. Bill Sherwood. There is no need for the other parties to reply to these verified statements because they are identical to those filed earlier which I arranged to have mailed to the other parties on August 2, 1991.

criminal cases.) (See *Steadman v. S.E.C.*, 450 U.S. 91, 101-102 (1981), reh. denied, 451 U.S. 933 (1981); *Sanrio Co. Ltd. v. Maersk Line*, 19 SRR 1627, 1632 (I.D.), adopted by the Commission, 20 SRR 375 (1980); *Port Authority of New York v. New York Shipping Association*, 22 SRR 1329, 1353 (I.D. 1984, adopted in relevant part, 23 SRR 21 (1985); *Hale v. Dept. of Transportation*, 772 F.2d 882, 885 (Fed. Cir. 1985).) The preponderance of the evidence standard, which is also the usual standard applying in civil cases before courts, is a qualitative, not merely a quantitative standard, and means that the evidence makes the existence of a fact more probable than not. (See discussion in *McCormick on Evidence* (3rd ed. 1984), sec. 339 at 956-957.)

In many instances, direct evidence is not available and courts or agencies have to rely on inferences. In other words, a "smoking gun" cannot be found in all or most cases. In such instances, reasonable inferences are permitted from circumstantial evidence, and if the finder of fact is an expert agency which is presumed to have special familiarity with the industry in question, the courts will respect the findings of the agency. (See *F.M.C. v. Svenska*, 390 U.S. 238, 249 (1968) (Commission entitled to draw inferences from incomplete evidence based on human experience generally or on Commission's special familiarity with the industry); *United States v. F.M.C.*, 655 F.2d 247, 253-254 (D.C. Cir. 1980) (hearsay and indirect evidence can be used to support finding of rebating absent direct evidence); *DeWitt v. Dept. of the Navy*, 747 F.2d 1442, 1444 (Fed. Cir. 1984); *Hale v. Dept. of Transportation*, cited above, 772 F.2d at 885; *Agreement No. 57-96*, 19 F.M.C. 291, 303 (FMC 1976).)

This record could have probably benefited if respondents Corporate World and Penn-Nordic had been more responsive and helpful, especially in view of the fact that each hurled charges against the other which one would expect any reasonable person to deny with evidence if the charges were untrue. Both respondents were specifically asked to

furnish evidence on certain matters but the requests were ignored. (See *Instructions Regarding Completion of the Evidentiary Record*, August 6, 1991, at 4 n. 1.) A failure to respond to specific charges by default or otherwise can mean that adverse inferences may be drawn against the defaulting or non-replying party. It is an elementary principle of law that when a party refuses or declines to come forward with information peculiarly within its possession and its adversary, who is not privy to such information, introduces only circumstantial evidence, such circumstantial evidence can carry the burden of persuasion and every reasonable inference may be drawn against the non-furnishing party. Thus, in *Alabama Power Company v. F.P.C.*, 511 F.2d 383, 391 n. 14 (D.C. Cir. 1974), the court stated:

It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so. (Citation omitted.) In regulatory proceedings, placing such a burden on the regulated firm, where the relevant information concerns its operations and management, has become part of the "common law" of regulations. (Citation omitted.)

See also the lengthy discussion regarding the drawing of adverse inferences from the failure of a party to furnish evidence within its possession in *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1336-1339, 1344 (D.C. Cir. 1972); *McCormick on Evidence* (3d ed. 1984) sec. 272.

Based on the principles of the law of evidence and the evidence submitted by Mr. Adair, which I find to be highly credible, and on certain other evidence, I find the allegations, as made in the original and amended complaints by Mr. Adair, to be mostly supported. To a large extent the facts remain the same as those I discussed in my earlier

rulings cited above. (See notice of Preliminary Evaluation of the Evidence and Opportunity to Supplement the Record, June 14, 1991.) These facts are as follows:

Some time in December 1989, Mr. William R. Adair, living in the Seattle, Washington area, purchased a used motorcycle with the intention of shipping it to his son in New Zealand. Mr. Adair asked a company known as KGM Assemblers, Inc., located in Kent, Washington, to prepare the motorcycle for shipment by assembling and crating it. KGM, on Mr. Adair's behalf, secured the services of a company known as Corporate World International, located in Mountlake Terrace, Washington, to handle the freight forwarding, including the obtaining of overland transportation from Washington State to California, and the selection of an overseas carrier.

As is customary among freight forwarders, Corporate World prepared a bill of lading on a Penn-Nordic form, which Penn-Nordic was later to validate. This bill of lading, which was later validated as an "on board" bill of lading by Penn-Nordic, shows "Corporate World International" both as the exporter and as the forwarding agent in the respective spaces provided in the bill of lading. The bill of lading also shows William R. Adair as consignee of the shipment and his address in Wellington, New Zealand with a telephone number. The bill of lading further shows the cargo to be "Box Std. used household goods not for resale - personal use only - shipper load and count and stow - . . . Freight Prepaid." The cargo was to be carried aboard the vessel "Col. Wellington," sailing from Oakland, California. The bill of lading is dated "January 14, 1989," which appears to be an obvious mistake which should read "January 14, 1990." There is also an "on board" stamp on the bill with the date "January 14, 1990" and initials of the person validating the stamp.

It is not clear exactly when the motorcycle was tendered to an overland carrier in Washington State for transportation to California, but Mr. Adair consigned it for shipment

through KGM Assemblers on December 8, 1989, and Penn-Nordic must have received it on or about January 14, 1990, in California, the date of Penn-Nordic's validated bill of lading. In any event, the motorcycle was packaged in a crate originally used to ship a Harley Davidson motorcycle. The crate had large lettering on it and contained viewing holes which enabled one to make a visual inspection of the contents without opening the crate. The crate had been loaded into a container for ultimate loading onto the oceangoing vessel, the *Col. Wellington* by persons unidentified but most likely by Penn-Nordic's agents. However, before the container was loaded aboard ship, Penn-Nordic removed the crate and placed it in a warehouse operated by a company known as International Trucking company, located in Oakland, California. This was done by Penn-Nordic because, according to Penn-Nordic's employee, Mr. Wilfred Garcia, Penn-Nordic had been having difficulties receiving prompt payment of freight from Corporate World in the past and was not paid promptly by Corporate World for the subject shipment, and indeed was not paid by Corporate World for the subject shipment until several months later and only after Penn-Nordic had to take legal steps for payment. Also, according to Mr. Garcia, Corporate World misdescribed the shipment and the cubic measurement on the shipment and on shipments it had booked with Penn-Nordic in the past. In the instant case, according to Mr. Garcia, Mr. Sherwood of Corporate World had "knowingly misdeclared this shipment to get himself a lower rate as this is his practice." (Penn-Nordic "Brief," dated April 30, 1990.) Furthermore, according to Mr. Garcia of Penn-Nordic, Corporate World failed to provide evidence of title to the motorcycle to Penn-Nordic so that the motorcycle could be exported from the United States. Mr. Garcia testified also that Penn-Nordic discovered that the shipment was not used household goods but rather a motorcycle and that Penn-Nordic had no specific rate for motorcycles in its tariff. Also, Mr. Garcia states that Penn-Nordic had notified

Corporate World on several occasions that Penn-Nordic would not ship the motorcycle until Corporate World paid the freight, and once notified Corporate World in writing that the shipment would be held up until Corporate World cleared up the misdescription and mismeasurement as well as paid the freight.

According to Penn-Nordic's on-board bill of lading, the cargo in question was booked for a sailing of the ship *Columbus Wellington*, which, according to an authoritative reference work, Lloyd's *Voyage Record* (issue of February 20, 1990, at page 48) sailed from the port of San Francisco on January 19, 1990. According to Lloyd's, furthermore, this ship arrived in New Zealand (Auckland) on February 5, 1990, and sailed from that port on the same day. (The on-board bill of lading contains a pen notation as "ETA 2/9/90," i.e., expected time of arrival on February 9, 1990.) When the ship arrived in New Zealand, of course, the motorcycle was not aboard, and the consignee in New Zealand, Mr. Adair's son, attempted to find out what had happened to it. Mr. Adair's son placed numerous transpacific telephone calls in his efforts to locate the motorcycle and was eventually notified that the insurance company had located it in the warehouse in Oakland and would not therefore pay the claim for lost cargo. During the course of his inquiries, furthermore, Mr. Adair's son asked Penn-Nordic's agent in New Zealand about the whereabouts of the motorcycle which had not arrived on the ship. The New Zealand agent notified him by letter dated May 11, 1990, that the agent had inquired of Penn-Nordic on the matter but had got no response. The agent therefore advised Mr. Adair's son to file a claim with the insurance company.

By letter dated June 1, 1990, Corporate World advised Mr. Adair's son that "despite repeated efforts with the line, the overseas agents and the Federal Maritime Commission, we have been unable to obtain the release of your cargo." Corporate World also advised

Mr. Adair's son to file a claim for lost cargo with the insurance company and sent "the necessary documents" to file such a claim. (See Exhibit No. 13, the letter cited.) By subsequent letter dated July 25, 1990, Corporate World advised that "your motorcycle has been located. It is currently in storage at a warehouse in Los Angeles (sic), California. This warehouse was the representative receiving point for Pennsylvania Nordic Line of Milford, Pennsylvania." This letter also advised that the warehouse representative for Penn-Nordic had gone bankrupt and was under new management and provided an address in Oakland, California with a telephone number. Corporate World advised furthermore that storage charges of \$125 per month had begun to accrue since January 1990, that the cargo would not be released without payment of such charges, that Corporate World "will be unable to advance these charges," and suggested that Mr. Adair's son file a complaint against Penn-Nordic with the Attorney General of Pennsylvania. (See Exhibit No. 14, which is the letter cited.)

Meanwhile, prior to the dates of these letters from Corporate World to Mr. Adair's son, Penn-Nordic had been in contact with Corporate World seeking payment of freight. Finally, by check dated April 12, 1990, Corporate World paid freight on the motorcycle shipment as well as for other shipments, which check was deposited on April 23, 1990. The check was paid to Penn-Nordic in care of its attorney, Mr. Alan B. Cooper, located in Milford, Pennsylvania. by letter dated April 18, 1990, addressed to Corporate World's attorneys, Mr. Cooper acknowledged receipt of the check as payment from Corporate World. Penn-Nordic's attorney further indicated that Penn-Nordic had agreed to accept the check as full payment and to "waive" storage charges. (See Exhibit No. 6.) He also indicated that for other shipments which were being held up pending payment of freight, payment would be held in escrow and not released to Penn-Nordic until there was proof

of release of the cargoes in question. (*Id.*) Notwithstanding this payment and apparent agreement, Penn-Nordic did not obtain the release of the motorcycle from the warehouse nor forward the shipment to New Zealand. In commenting on the representations of its attorney, Mr. Cooper, Penn-Nordic, through Mr. Garcia, states that "our attorneys made an error in stating that we can waive all storage charges." (Penn-Nordic "Brief," dated April 30, 1990(sic).) Moreover, Mr. Garcia states that Penn-Nordic "has no intention of forwarding motorcycle until title is made available and proper rate is filed and all storage fees are paid for to warehouse." (Penn-Nordic answer to original complaint, dated April 30, 1991, at para. 2.) Also, Penn-Nordic insists that additional funds be paid for shipment of the motorcycle to New Zealand. Incidentally, the certificate of title is in the possession of Mr. Adair's son in New Zealand, as no one advised Mr. Adair or his son that they must furnish evidence of title for customs purposes. (Complainant's replies, dated June 5, 1991, at 2.)

Complainant, Mr. William R. Adair, and his son in New Zealand, have been continuously seeking for approximately one and one-half years to locate the motorcycle and then to have it transported to New Zealand, or, alternatively, for Penn-Nordic and later Corporate World to pay damages for the various expenses incurred by the Adairs in their efforts to locate and obtain the motorcycle. During this long endeavor, apparently on the advice of Corporate World, Mr. Adair also contacted the offices of the Attorney General in Pennsylvania and in Washington State seeking their assistance. The investigation of Penn-Nordic's activities by the Pennsylvania office is apparently still open. The Washington State office concluded that "Mr. Adair is the victim of a foul-up in the transport system" and recommended that Corporate World International, as the initial carrier . . . insist that Pennsylvania Nordic either immediately forward the Adair shipment or provide proof of

loss so that Mr. Adair can be reimbursed." (See Exhibit No. 7, letter from Mr. William Iulo, Consumer Representative of the Attorney General of Washington, to Mr. William Sherwood of Corporate World, dated December 20, 1990.) Interestingly, Mr. Iulo also recommended that Corporate World insist that Penn-Nordic forward the shipment in view of the apparent agreement that Penn-Nordic would do so and would waive storage charges as set forth in the letter from Penn-Nordic's attorney, Mr. Cooper. (*Id.*)

Discussion and Conclusions

In his amended complaint, Mr. Adair focuses on the particular provisions of law that he feels have been violated by both respondents Corporate World and Penn-Nordic. These laws are sections 10(b)(6) and 10(d)(1) of the Shipping Act of 1984 (46 U.S.C. app. secs. 1709(b)(6); 1709(d)(1)).

Section 10(b)(6) of the 1984 Act states as follows in the pertinent parts cited by complainant:

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may--(6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of--(E) the adjustment and settlement of claims.

Section 10(d)(1) of the 1984 Act states:

(1) No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

The facts in this case are perhaps unusual with respect to allegations of unfair practices in the matter of settlement of claims in violation of section 10(b)(6)(E) of the Act. The "claims" in this case are not the usual loss or damage claims, but claims by Mr. Adair that Penn-Nordic has unfairly refused to forward the shipment or to settle Mr. Adair's claims of financial injury caused by Penn-Nordic's termination of the shipment and placing the motorcycle in a warehouse where it has been accruing storage charges. Earlier Mr. Adair had also cited section 10(b)(6)(D), which prohibits unfair practices regarding the "loading or landing of freight."⁷ This record would probably support a finding that Penn-Nordic has engaged in an unreasonable practice under both sections 10(b)(6)(D) and 10(b)(6)(E). However, these laws apply only to the practices of common carriers and do not name freight forwarders, such as Corporate World. Because the record supports findings of violations by both respondents of section 10(d)(1) regarding unreasonable practices relating to handling of property, which law applies to carriers and forwarders, it is not necessary to make determinations under section 10(b)(6) as well in order to give Mr. Adair relief.

In his original and amended complaints, and in his supporting, sworn statements, Mr. Adair contends that respondent Penn-Nordic acted unreasonably in several ways. Mr. Adair argues that Penn-Nordic accepted a shipment, issued a bill of lading representing that the shipment was on board, and ultimately received payment for the shipment from Corporate World. Nevertheless, Penn-Nordic removed the shipment from its container, placed the cargo in a warehouse where it continues to accrue storage charges, failed to

⁷See sworn reply statements of Mr. Adair, June 5, 1991, at page 3. Mr. Adair seems to have dropped reference to section 10(b)(6)(D) in his later amended complaint, which refers only to sections 10(b)(6)(E) and 10(d)(1) of the 1984 Act.

notify the cargo owner or Corporate World promptly, and refuses to handle the shipment without further payments to release the cargo from storage despite its apparent agreement to do so. Complainant argues that Penn-Nordic "has violated its obligation to deliver." (Original complaint at para. G.) Complainant comments on the defense raised by Penn-Nordic, i.e., that Penn-Nordic aborted the shipment because of failure of Corporate World to pay the freight. Complainant argues that Penn-Nordic apparently had been doing business with Corporate World under credit arrangements allowing shipments to go forward pending payment, but in any event Penn-Nordic was ultimately paid and still refuses to move the shipment.

In his amended complaint, Mr. Adair alleges that Corporate World, the freight Forwarder, has also engaged in unreasonable practices. Mr. Adair contends that he engaged Corporate World as his agent to handle the shipment. However, Corporate World apparently failed to furnish the proper shipping documentation to permit the motorcycle to leave the country, possibly misdescribed the motorcycle on the bill of lading as used household goods, and failed to make timely payment to Penn-Nordic of Mr. Adair's money, which money was given to Corporate World for that purpose. Furthermore, even after Corporate World had been involved in disputes with Penn-Nordic over late payments and delayed shipments and had engaged attorneys to resolve their disputes, and knew or should have known that the motorcycle shipment had been aborted, Corporate World was advising Mr. Adair's son, as late as June 1, 1990, that he should file a claim for lost goods with the insurance company. Not until July 25, 1990, did Corporate World advise Mr. Adair's son that the motorcycle had been located and provide the address and telephone number of the warehouse.

In its only filing in this proceeding, Mr. Garcia, for Penn-Nordic, replied to the original complaint. Penn-Nordic argues that complainant has been misled by Corporate World, that Corporate World is an unlicensed freight forwarder who misdescribed the shipment on the bill of lading and showed incorrect measurements in order to get a lower rate from Penn-Nordic. Also, Corporate World failed to provide evidence of title to the motorcycle to Penn-Nordic, which allegedly is necessary to permit the motorcycle to be exported. Penn-Nordic claims that it was not paid for the shipment until "after five months of faxes and letters asking them for payment." Penn-Nordic also contends that it notified Corporate World on numerous occasions that it would not forward the shipment until paid. Penn-Nordic argues, furthermore, that it never received a shipment from Mr. Adair but from Corporate World, the freight forwarder, and that Penn-Nordic dealt directly with Corporate World, not Mr. Adair. Penn-Nordic disclaims any responsibility for any of Mr. Adair's damages and states that it will not pay the storage charges to the warehouse to release the motorcycle and will not move the shipment until provided with title to the motorcycle and additional funds.⁸

Corporate World, in its only filing, replied to the original complaint by admitting that it received money from KGM Assemblers to ship the motorcycle, but that its late payment to Penn-Nordic had nothing to do with the shipping of the motorcycle. That is because Penn-Nordic accepted the shipment and even issued an on-board bill of lading,

⁸Penn-Nordic's own words in reply to the complaint are clear and concise. Penn-Nordic states (Replies to original complaint, April 30, 1991, at page 2):

B. Penn Nordic has no intentions of responding to any financial demands of claimant.

1. Penn Nordic does not have any intentions of delivering motorcycle to New Zealand nor providing claimant a grand sum of \$4,623.30.

- a. We have no intention of providing claimant with \$2,500.00.
- b. We have no intention of providing claimant with any financial demand.

which was supposed to mean that the shipment had gone forward on the vessel. According to Corporate World, under such circumstances, payment usually follows and, if not, the NVOCC holds the shipment at destination. Had the shipment gone to New Zealand with payment still due, according to Corporate World, it would have "forwarded payment immediately." None of the present problems would have happened had Penn-Nordic complied with its on-board bill of lading and shipped the motorcycle as that document had indicated was done. Corporate World states that it prepared shipping documents correctly and furnishes examples of export declarations or bills of lading for other motorcycle shipments which show the cargo as "personal effects" or "used household goods." Corporate World states furthermore that it retained an attorney because Penn-Nordic had not been paying vessel-operating carriers, and many other Corporate World shipments were accordingly not being released overseas. Corporate World was not trying to "obscure Mr. Adair." It states that "when we located the vehicle all we asked Penn Nordic to do was reimburse us for not shipping it. They refused, or we could not get a hold of them because their phone number was disconnected (of which it was several times during this period). The phone number of the warehouse in Oakland was also disconnected." (Verified answers of Corporate World, dated August 30, 1991, at para. II.3.)

I find that the record shows both respondents to have acted unreasonably. At the time of the booking of the shipment in December 1990, Penn-Nordic had no tariff on file with the Commission, according to the Commission's records. Nevertheless, Corporate World booked the motorcycle shipment with Penn-Nordic, filled in the Penn-Nordic bill of lading forms, and arranged to have the shipment moved to California, intending to have it loaded onto the *Columbus Wellington*, which sailed on January 19, 1990. Penn-Nordic validated the bill of lading and made it an on-board bill, i.e., it announced in the document

that the cargo was not only received by Penn-Nordic's agent in California but loaded on board a vessel, indicating loading as of January 14, 1990, with an on-board stamp validated as of that date. Nevertheless, as Penn-Nordic admits, Penn-Nordic removed the cargo from the container at the "last minute." Penn-Nordic did this, it states, because of difficulties Penn-Nordic had been having with Corporate World in regard to late payments and to Corporate World's "insisting that cargo be released before they pay." ("Brief" of Penn-Nordic, dated April 30, 1990, at page one.) Penn-Nordic also claims that it discovered that the shipment had been misdescribed and mismeasured. The evidence about misdescription is, however, inconclusive. Corporate World has produced evidence indicating that a used motorcycle has been described on shipping documents as household goods or personal effects. Mr. Adair states that the motorcycle was intended to be part of his son's household and that automobiles are sometimes lumped under this classification. Penn-Nordic has furnished no evidence to support Penn-Nordic's contention that the measurement of the motorcycle shown on the bill of lading was incorrect. Furthermore, even if there was something wrong with the description on the bill of lading, Penn-Nordic nowhere explains why it validated the bill as of January 14, 1990, for a shipment that sailed on January 19, 1990, without first inspecting the shipment if it suspected something was wrong. In other words, someone placed the crate containing the motorcycle into an oceangoing container. If the oceangoing container had been loaded before it arrived at Penn-Nordic's terminal in California and had not been unsealed, there would presumably be no reason for Penn-Nordic to open the container to inspect each package therein. If the loading of the container occurred at Penn-Nordic's terminal in Oakland and something

seemed wrong with the crate which, according to the evidence was obviously loaded with a motorcycle of some sort, why was an on-board bill of lading issued?⁹

The record suggests not that Penn-Nordic shorted the shipment because it had visual reason to question the contents or measurement of the crate, but rather that Penn-Nordic did this to pressure Corporate World to pay its delinquent accounts as well as the instant account. The claim that the crate contained a mismeasured and misdescribed cargo appears to be an after-the-fact rationalization. However, whatever the reason, once Penn-Nordic issued an on-board bill of lading, which is an independent document on which Corporate World and other persons customarily rely in shipping, the abrupt termination of the shipment contrary to such a bill subjects Penn-Nordic to liability.

It is not clear exactly when, but some time after Penn-Nordic abruptly terminated the motorcycle shipment and placed the motorcycle in a warehouse where it began to accrue storage charges, Corporate World became aware that the shipment had not moved and that the on-board bill of lading was not correct. Corporate World certainly had to be aware of the aborted shipment not later than April 18, 1990, when Penn-Nordic's attorney acknowledged payment of the freight for the shipment and mentioned a supposed agreement that Penn-Nordic would see to it that the shipment went forward. Probably Corporate World was aware even earlier since it had earlier hired attorneys seeking to resolve its disputes with Penn-Nordic.

⁹Penn-Nordic claims that Corporate World deliberately misdescribed the shipment and mismeasured it in order to get a lower rate "as this is its practice." This claim is not supported by evidence furnished for the record by Penn-Nordic. Also, Penn-Nordic claims that it had no rate for carriage of motorcycles. It is ironic that Penn-Nordic would be making such claims. According to the Commission's records, Penn-Nordic had no tariff on file in December 1989 and January 1990, not filing a tariff until March 1990. I officially notice this fact. (See 46 CFR 502.226(a).)

There is therefore a basis to find that Penn-Nordic unreasonably aborted the motorcycle shipment notwithstanding the fact that it had issued an on-board bill of lading, thereby allowing a misleading shipping document to go forward in the shipping process. However, the negligent or deliberate issuance of an on-board bill of lading is not the only basis for a finding that Penn-Nordic acted unreasonably. Penn-Nordic made no efforts to protect the interests of the cargo owner or consignee. Penn-Nordic argues that it was dealing with the nominal shipper, Corporate World, which listed itself on the bill of lading as both exporter and forwarding agent. However, the bill of lading also clearly identified the consignee of the shipment, Mr. Adair's son, and even provided his address and telephone number in New Zealand. As Corporate World notes, Penn-Nordic need not have aborted the shipment. It could have shipped the motorcycle to New Zealand, and if payment had still not been received in the United States, could have retained possession of the cargo until paid in New Zealand by the consignee or by Corporate World. Instead, Penn-Nordic aborted the shipment, ignored the interests of the cargo owner and the consignee, and did not make any effort to notify the consignee that the motorcycle had been placed in a warehouse where it was accruing storage charges. Indeed, even by May 11, 1990, some three months after the shipment was supposed to have arrived in New Zealand and almost one month after Penn-Nordic had been paid for the shipment, Penn-Nordic had still not advised the consignee, Mr. Adair's son, as to what had happened to his motorcycle. (See letter from Penn-Nordic's New Zealand agent to Mr. Adair's son, dated May 11, 1990, Exhibit No. 11.)

Penn-Nordic's indifference to the interests of the cargo owner and consignee in New Zealand, as shown above, is consistent with its subsequent behavior when it was finally paid freight for the shipment in April 1990. According to Penn-Nordic's attorney,

Mr. Cooper, Penn-Nordic had agreed to move the shipment and absorb ("waive") the storage costs once payment of freight had been received. However, Mr. Garcia of Penn-Nordic simply reneged on this agreement, stating that "our attorney made an error" and that the storage charges could not be waived. Thus, Penn-Nordic issued and allowed an on-board bill of lading to go forward, on which document other persons would rely, failed to notify the cargo interests that the bill of lading was incorrect, and after agreeing, through its attorney, that Penn-Nordic would move the shipment forward and pay storage charges that Penn-Nordic itself had caused to accrue, reneged on its agreement. Moreover, Penn-Nordic has received payment of freight for the shipment, but retains the freight and refuses to refund it, although it never performed the transportation service.

The above litany of misconduct by Penn-Nordic amply demonstrates that Penn-Nordic failed to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property," in violation of section 10(d)(1) of the 1984 Act. In fact, such conduct also would support a finding that Penn-Nordic engaged in "any unfair or unjustly discriminatory practice" in the matter of "the loading and landing of freight" or "the adjustment or settlement of claims," in violation of sections 10(b)(6)(D) and (E) of the Act. However, as I have said, it is unnecessary to determine these additional violations since Penn-Nordic can be found to have violated section 10(d)(1).

The facts discussed above show amply that Penn-Nordic behaved unreasonably under section 10(d)(1) of the 1984 Act. Interestingly, this conduct would undoubtedly have contravened other standards of law under principles of contract and common-carrier law applicable in courts of law, and quite possibly Mr. Adair could have obtained relief had he sued Penn-Nordic in a court of law or perhaps admiralty rather than before this

Commission. It is a fundamental principle of contract law, especially as it pertains to common carriers, that persons entering into contracts must act in good faith to seek to accomplish the purposes of the contract and not to do anything to hinder performance. In most cases, furthermore, if a party begins to perform under a contract, there is an express or implied promise to complete performance. It has been said that the standard doctrine regarding the duty of good-faith performance by a promisor was first articulated in 1933 by the New York Court of Appeals in *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, in which the Court stated:

In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. (188 N.E. at 167.)

This duty of good faith to perform without introducing hindrances to performance has been articulated and followed by numerous courts and authorities in the field of contract law ever since. Thus, in 11 Williston, *Law of Contracts* (3d ed.), sec. 1296, at 57, this authority states, quoting cases:

A contracting party impliedly obligates himself to cooperate in the performance of his contract and the law will not permit him to take advantage of an obstacle to performance which he had created or which lies within his power to remove.

The Restatement of the Law of Contracts (Second), sec. 205, states in similar fashion:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

The Uniform Commercial Code, sec. 1-203, has a similar provision as follows:

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

The comment to the above provision states:

This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties.

Not only is there a duty on the part of a contracting party to perform according to the party's promises in good faith, but there is also the duty not to hinder or prevent performance and not to place himself in the position of being unable to perform.

As stated in 2 *Farnsworth on Contracts* (1990), sec. 7.17, at 311:

[T]he duty [i.e., duty of good faith and fair dealing] may not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty not only to refrain from hindering or preventing the occurrence of conditions of the party's own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals. (Footnote citations omitted.)

For further discussions of the duty of good-faith performance and duty not to hinder or prevent performance or to disable oneself from performing, see 17A C.J.S., Contracts, sec. 468 at 641-642 (promise to perform implies promise not to hinder, impede, or obstruct performance or to perform an inconsistent act); *Id.*, sec. 470 (party who voluntarily disables self from performing his contract is not relieved of liability for nonperformance); 17A American Jurisprudence 2d, Contracts, sec. 742 (party who puts it out of his power to perform a contract commits a breach and is liable to pay damages); see also *Scholtes v. Signal Delivery Service, Inc.*, 548 F.Supp. 487, 492-493 (W.D. Ark. 1982) (party who begins

performance implies that he will complete performance, and it is an implied provision in every executory contract that neither party will do anything to prevent, hinder, or delay performance).

In the context of common carriers, a common carrier who enters into a contract of carriage is, of course, under a duty to deliver, although a number of defenses are allowed under the Carriage of Goods by Sea Act (COGSA) (46 U.S.C.A. secs. 1300 et seq.). See, e.g., *Canadian Refractories, Etc. v. S.S. Hellenic Nav.*, 452 F.Supp. 926, 928 (S.D.N.Y. 1978); *Surrendra (Overseas) Private Ltd. v. S.S. Hellenic Hero*, 213 F.Supp. 97, 101 (S.D.N.Y. 1963); Schoenbaum, *Admiralty and Maritime Law* (West 1987), sec. 9-2 at 279 (carrier is liable for damages if he refuses to transport cargo after entering into contract of affreightment).

In modern contract law, a party is also permitted some discretion in discontinuing performance if the party has reason to believe that the other party to the contract will not perform, e.g., is financially unable to pay. Thus, both the U.S.C., sec. 2-609, and the Restatement of Contracts (Second) sec. 251, allow a party to demand assurance from the other party that that party will perform his end of the contract. However, it has been recognized that the party asking for such assurance before continuing with his own performance is not entitled to suspend performance if he had reason to believe that the other party might be unreliable at the time the contract was entered into. In other words, if a party enters into a contract with another party, having reason to believe at the time that the other party might be unreliable or unsound financially, the first party has in effect assumed the risk and cannot later refuse to perform. (See discussion in *The Law of Contracts* (3d ed.), Calamari and Perillo (West 1987) at 519.) Furthermore, in shipping or admiralty law, if a carrier is still owed payment of freight on a shipment, the carrier is entitled to hold up delivery until being paid by the consignee at destination, i.e., the carrier

may exercise a lien on the goods. (See *Johnson Products Co., Inc. v. M/V Molinera*, 628 F.Supp. 1240, 1248 (S.D.N.Y. 1986); Gilmore and Black, *The Law of Admiralty* (2d ed.) sec. 3-45; 70 Am Jur 2d, Shipping, sec. 793.)

Another principle of law, which has some relevance to the present case, is the principle of agency law that holds that the representations of an agent acting within the scope of its apparent authority can bind its principal as against third persons relying on the agent's representations. In other words, a principal which has entrusted its agent with authority to conduct certain affairs cannot later on disavow the agent which has acted within its authority and, as regards a third person, has acted within its apparent authority. The basic principles have been stated by one authority as follows (3 Am Jur 2d, Agency, secs. 78 and 79):

The liability of the principal for the acts and contracts of his agent is not limited to such acts and contracts of the agent as are expressly authorized, necessarily implied from express authority, or otherwise actually conferred by implication from the acts and conduct of the principal. So far as concerns a third person dealing with an agent, the agent's "scope of authority" includes not only the actual authorization conferred upon the agent by the principal, but also that which has apparently been delegated to him. . . . In effect, therefore, an agent's apparent authority is, as to third persons dealing in good faith with the subject of his agency and entitled to rely upon such an appearance, his real authority, and it may apply to a single transaction, or to a series of transactions. (Footnote citations omitted.)

Stated inclusively, then, the rule is that if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's act or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, such principal is bound by the acts of the agent within the scope of his apparent authority as to any person who, upon the faith of such holding out, believes, and has reasonable ground to believe, that the agent has such authority, and in good faith deals with him. (Footnote citations omitted.)

Finally, mention should be made of the principles in admiralty law that deal with issuance of on-board bills of lading. Such principles hold that a carrier generally becomes liable for the representations made on bills of lading which the carrier has issued and cannot disavow the statements on the bill of lading, especially those relating to the carrier's own conduct in loading the cargo. Bills of lading are important documents which evidence not only receipt of cargo but contracts of affreightment and evidence of entitlement to the goods. (See Gilmore and Black, *The Law of Admiralty* (2d ed.) sec. 3-1; 1A *Benedict on Admiralty* (7th ed.) sec. 31.) Once issued and validated by carriers, they enter into the stream of commerce, and persons coming into their possession are entitled to rely on the statements and representations made thereon which, if false, result in carrier liability. See, e.g., *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir. 1985) (carrier which issued on-board bill of lading falsely stating that 100 bundles had been loaded on board held liable for the full 100 bundles to the purchaser, although only 30 bundles had been loaded). The Court in the cited case commented on the fact that the carrier had issued an incorrect on-board bill of lading by stating:

The carrier's misrepresentation therefore amounted to a fundamental breach going to the very essence of its contract and precluding it from invoking those provisions [of COGSA limiting liability]. (779 F.2d at 848.)

See also *General Foods Corporation v. Felipe Camarao et al.*, 172 F.2d 131, 133 (2d Cir. 1949); 2A *Benedict on Admiralty* (7th ed.) sec. 33, at pages 4-8 through 4-11.

The application of the above principles of admiralty, contract, and agency law becomes apparent when considering the facts in this case. Thus, although having no tariff on file at the time, Penn-Nordic accepted a booking from Corporate World in December 1989, i.e., entered into a contract with Penn-Nordic. Penn-Nordic later aborted the

shipment by abruptly removing the motorcycle crate from a container and placing it in a warehouse, thus breaching its contract of affreightment with Corporate World, ostensibly because Corporate World had not paid freight promptly on this and other shipments. However, Penn-Nordic knew or should have known of Corporate World's payment history when it entered into this particular contract, as it had been doing business with Corporate World on other shipments. Furthermore, Penn-Nordic issued an on-board bill of lading, which was false, since the cargo had not been loaded on the ship, thereby misleading persons coming into possession of the bill. Also, instead of aborting the shipment, Penn-Nordic could have sent it to New Zealand and retained possession of the motorcycle pending payment by the consignee or the shipper. Moreover, Penn-Nordic did not notify the consignee of the whereabouts of the motorcycle despite inquiries from the consignee to Penn-Nordic's agent in New Zealand made almost a month after Penn-Nordic had been paid for the shipment. When Penn-Nordic was finally paid for the shipment in April 1990, it retained the freight money and refused to perform, even though it had agreed through its attorney, i.e., its agent, that it would forward the shipment and absorb the accrued storage charges when it was finally paid. However, Penn-Nordic simply reneged on its agreement, claiming that its attorney was not authorized to make such an agreement on its behalf, although the attorney was clothed with apparent authority and the third person, Corporate World, was entitled to rely on the attorney's representations.

I conclude, therefore, that this record amply demonstrates that Penn-Nordic behaved unreasonably and in violation of section 10(d)(1) and should be held fully accountable for the damage it caused to fall on the innocent cargo owner, Mr. Adair, the complainant.

As regards the other respondent, Corporate World, there is evidence showing that Corporate World, acting as a freight forwarder and, accordingly, as an agent and fiduciary

of the cargo owner, Mr. Adair, did not maintain the standard of care required by law of such fiduciaries nor fulfill its duties to the cargo owner, Mr. Adair. Consequently, I conclude that Corporate World failed to observe just and reasonable regulations and practices, in violation of section 10(d)(1) of the 1984 Act.

As discussed earlier in this decision, Mr. Adair, wishing to ship a motorcycle to his son in New Zealand, entrusted the matter to a company that assembled and crated the motorcycle, KGM Assemblers. On Mr. Adair's behalf, KGM secured the services of a freight forwarder, Corporate World International, which, incidentally, does not have a license or a bond as required by the 1984 Act.¹⁰ Corporate World thereby became Mr. Adair's agent and acted in a fiduciary capacity for him. It received money from Mr. Adair, which was supposed to be paid to the carrier selected by Corporate World to handle the transportation. Corporate World prepared the various shipping documents and selected a non-vessel operating common carrier (NVOCC), namely, Penn-Nordic, with whom Corporate World had been doing business. Corporate World selected the NVOCC, although Penn-Nordic had no tariff on file with the Commission, and although Corporate World claims to have had difficulties with Penn-Nordic because Penn-Nordic had not been paying over freight money to underlying vessel-operating carriers, and, according to Corporate World, many other shipments handled for it by Penn-Nordic were not being released overseas. Nevertheless, Corporate World selected Penn-Nordic to handle the

¹⁰Section 19(a) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1718(a), states: "No person may act as an ocean freight forwarder unless that person holds a license issued by the Commission." The law further provides that to obtain such a license from the Commission, such person must be "qualified by experience and character to render forwarding services" and the person must also furnish a bond. The Commission has issued detailed regulations regarding the licensing and bonding requirements. (See 46 CFR Part 510.) Despite Penn-Nordic's charges that Corporate World is an unlicensed freight forwarder, Corporate World has not responded to the charges and there is no explanation in the record as to why Corporate World operates without a license or a bond.

transportation, prepared a Penn-Nordic bill of lading, which Penn-Nordic ostensibly validated as an on-board bill of lading, as discussed, but, contrary to the document, aborted the shipment and placed the motorcycle in a warehouse where it accrued monthly storage charges. This was done by Penn-Nordic, as discussed earlier, because Corporate World had not paid over Mr. Adair's freight money on this shipment and apparently on other shipments for other cargo owners as well.

Both Corporate World and Penn-Nordic retained attorneys because of their ongoing disputes over a number of shipments. Corporate World finally paid Penn-Nordic's attorney in Pennsylvania for Mr. Adair's shipment, which payment was acknowledged by Penn-Nordic's attorney on April 18, 1990, some three months after Penn-Nordic had aborted the shipment by placing the motorcycle in a warehouse in Oakland, California in mid-January 1990.

Corporate World had been engaged in ongoing disputes with Penn-Nordic in connection with the Adair shipment and others and had been told by Penn-Nordic's attorney in April 1990 that Penn-Nordic would forward the Adair shipment. Nevertheless, Corporate World seemed to be in no hurry to notify Mr. Adair of the aborted shipment. Indeed, as late as June 1, 1990, i.e., almost two months after Corporate World had been advised by Penn-Nordic's attorney in Pennsylvania that Penn-Nordic would forward the Adair shipment and would absorb the storage charges, Corporate World advised Mr. Adair's son, the consignee of the motorcycle, that Corporate World had been unable to obtain the release of the motorcycle despite repeated efforts. Corporate World also advised Mr. Adair's son to file a claim for "lost cargo" with the marine insurance company, as well as to file a complaint with the Office of Consumer Affairs of the Attorney General of Pennsylvania. (See Exhibit No. 13, letter dated June 1, 1990, from Corporate World

to Mr. Adair's son in New Zealand.) Not until July 25, 1990, did Corporate World finally advise Mr. Adair's son that the motorcycle had been located at the warehouse in Oakland, California. Mr. Adair's son in New Zealand was then advised that Corporate World would be unable to pay the accrued storage charges, and Corporate World again advised that Mr. Adair's son file a complaint with the Pennsylvania authorities against Penn-Nordic. (See Exhibit No. 14, letter dated July 25, 1990.)

Corporate World blames Penn-Nordic for the trouble in question because Penn-Nordic issued an on-board bill of lading, and Corporate World contends that had Penn-Nordic shipped the motorcycle in accordance with the bill, payment would have been made by Corporate World if there were a problem at destination. Corporate World even now states that it offers to move the motorcycle to New Zealand at no charge to Mr. Adair if the motorcycle can be located (but not necessarily to pay all the accrued storage charges). (Corporate World's verified letter of reply, dated August 30, 1991.)

As a freight forwarder selected by Mr. Adair or by his agent to handle Mr. Adair's shipment and Mr. Adair's money, Corporate World became an agent and a fiduciary for Mr. Adair. Freight forwarders, whom the Commission licenses, have long been held to high standards of performance because of the position of trust that they occupy. In *Dixie Forwarding*, 8 F.M.C. 109, 116, 118 (1964), the Commission discussed the role of a forwarder as follows:

The freight forwarder occupies a position of enormous competitive and economic power as to carriers and enjoys a fiduciary relationship with shippers. He is in a position to do grave economic harm to both.

. . . the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder.

In numerous other cases, the Commission has made clear that a freight forwarder occupies a position of trust with respect to its shipper clients and is expected to know, understand, and follow scrupulously the requirements established by law and the Commission's regulations (and to have sufficient financial standing to secure a fidelity bond). (See, e.g., *Harry Kaufman, Independent Ocean Freight Forwarder*, 16 F.M.C. 256, 271 (1973); *License Application, James J. Boyle*, 10 F.M.C. 121, 127 (1966); *Independent Ocean Freight Forwarder Application--Lesco Packing Co., Inc.*, 19 F.M.C. 132, 136-137 (1976); *Aetna Forwarding Co., Inc.--Revocation of License*, 8 F.M.C. 545, 550-551 (1965).)

Forwarders perform many duties for the shippers and owners of goods, making all arrangements for moving the goods to ports, securing space with carriers, preparing shipping documents, and they even act for cargo owners and shippers in prosecuting claims against carriers and insurance companies. (See general description of these functions in *U.S. v. American Union Transport*, 327 U.S. 437, 442-443 (1946); see also the discussion of these functions by the Court in *New York Foreign Freight Forwarders and Brokers Association v. F.M.C.*, 337 F.2d 289, 292 (5th Cir. 1964); see also Schoenbaum, *Admiralty and Maritime Law*, cited above, sec. 9-3.)

The courts as well as the Commission usually regard freight forwarders as agents of shippers and exporters. (See *U.S. v. American Union Transport*, cited above, 327 U.S. at 443; *New York Foreign Freight Forwarders, etc.*, cited above, 337 F.2d at 292; *Ingersoll Milling Machine company v. M/V Bodena*, 619 F.Supp. 493, 502 (S.D.N.Y. 1985); 1C *Benedict on Admiralty*, cited above, at page 6-10.) The Commission's regulations furthermore consider the licensed freight forwarder to be the agent of the shipper, consignee, seller, etc. (See 46 CFR 510.2(o); and 46 CFR 510.2(n).) In agency law, it is a fundamental principle that an agent acts as a fiduciary for its principal. The agent is

under obligations of fidelity to the principal. The principal reposes trust or confidence in the agent, and the agent is bound to exercise "the utmost good faith, loyalty, and honesty toward his principal." (See 3 Am Jur 2d, Agency, secs. 209, 210.) An agent "owes to his principal the use of such skill as may be required to accomplish the object of his employment, and if he omits to exercise reasonable care, diligence, and judgment, as a result of which failure his principal is damaged, he may be held responsible for such damage." (3 Am Jur 2d, Agency, sec. 215.) It has also been held that an agent must give the principal the benefit of all the agent's knowledge and skill. (See *Merchant v. Foreman*, 322 P.2d 740 (Kansas), cited in 3 Am Jur 2d, Agency, at page 719 n. 13.)

If an agent has special skills in a certain field, the agent assumes an obligation to exercise such care and skills as would characterize its counterparts in the same field, which are different in kind from the diligence or capacity of the ordinary citizen." (3 Am Jur 2d, Agency, cited above, at sec. 217; see also Restatement, Agency 2d, sec. 379(1).) An agent is liable to its principal for any loss occasioned by breach of its duties to the principal and may be sued by its principal on a tort or contract theory. (3 AM Jur 2d, Agency, cited above, sec. 333, at pages 840-841.) The measure of damages in such cases would be that recovery which would "most nearly make the principal whole." (3 Am Jur 2d, Agency, cited above, at page 841; *Dubern v. Girard Trust Bank*, 454 F.2d 565 (3rd Cir. 1972).) Furthermore, an agent may still be held liable to its principal for breach of the agent's duty even though an illegal intervening act occurred. (See *Thropp v. Bache Halsey Stuart Shields, Inc.*, 650 F.2d 817 (6th Cir. 1981).

Freight forwarders have been held liable under admiralty and negligence law in suits brought before federal courts because of the breach of their fiduciary duties toward their shipper-principals. In one of these cases, *Johnson Products Co., Inc. v. M/V La Molinera*,

628 F.Supp. 1240, 1246, the court found the freight forwarder liable to its shipper-principal when the shipper had to pay the underlying vessel-operating carrier a second time because the freight forwarder had improperly paid freight to a financially unreliable NVOCC. The court commented on the role of the freight forwarder as follows:

The relationship between a shipper and a freight forwarder is "fiduciary" and of "the greatest trust and fidelity." (Case citation omitted.) ICS [the forwarder] as the agent of Johnson Products [the shipper] had a duty to take care in arranging and supervising the transport of the cargo. See *Knudsen v. Torrington Co.*, 254 F.2d 283, 286 (2d Cir. 1958) (noting that the agency relationship "implies a promise to use care and skill and imposes fiduciary obligations of loyalty and obedience not normally present in other bilateral agreements.") Instead, the question is whether ICS should have acted, in its fiduciary capacity, to shield Johnson Products from loss due to COSA's [the NVOCC] financial difficulties. The court concludes that ICS could and should have so acted, but failed to--either because of conflicting interests arising out of its relationship with COSA, or because of negligence. In either case, however, ICS cannot escape liability. (Case citations in which forwarders have been held liable for various types of negligence or misconduct in handling shipments omitted.)

In the cited case, the freight forwarder had caused its shipper financial injury by paying freight money to an unreliable, financially shaky NVOCC who had not paid the money over to the vessel-operating carrier, by misleading the shipper about the loading dates, and by handling misleading bills of lading. The result was that the shipper had to pay freight a second time to obtain release of the cargo in Africa. The court cited other cases in which forwarders had failed to exercise proper supervision over shipments and were consequently held liable for damages which their failures and misconduct caused to fall on their shipper-clients. One of these cases cited was *Ingersoll Milling Machine Co. v. M/V Bodena*, cited above, 619 F.supp. 493. In this case, the forwarder was held liable to the shipper for failure to see to it that a bill of lading was issued calling for safe stowage

below deck and for failing to advise its shipper-principal that an improper bill of lading had been issued by the carrier. (See 619 F.Supp. at 501-502.)

When measured against the standards discussed, which require care, skill, and diligence in supervising the Adair shipment, as well as utmost loyalty, good faith, and honesty toward the shipper, it is evident that Corporate World failed to comply with such duties or meet such standards. Corporate World, whose business it is to handle export shipments, firstly selected an NVOCC, which at the time had no tariff on file with the Commission, a violation of section 8(a) of the 1984 Act, 46 U.S.c. app. sec. 1707(a). Possibly a lay person would not know or inquire about whether a particular carrier had rates on file with the Commission in Washington, D.C., but someone in the business of handling export shipments ought to have known and cared. Secondly, Corporate World selected this NVOCC, Penn-Nordic, to handle the Adair shipment although Corporate World had apparently been having problems with Penn-Nordic and had to retain legal counsel to resolve its disputes with Penn-Nordic over a number of shipments. Corporate World even states that Penn-Nordic had not been paying over ocean freight money to vessel-operating carriers resulting in "our many other shipments . . . not being released overseas." (Corporate World reply letter, dated August 30, 1991.) Thirdly, Corporate World was entrusted with money from Mr. Adair, which money was supposed to be paid to the NVOCC. The booking for the Adair shipment was made some time in December 1989, and the shipment was tendered to Penn-Nordic in mid-January 1990 in California. Corporate World did not pay over Mr. Adair's money to Penn-Nordic until mid-April 1990, and then only after lawyers had been engaged to resolve several disputes on the Adair and other shipments. Because of this failure to pay promptly, Penn-Nordic aborted the shipment, as discussed earlier.

Fourthly, when Mr. Adair's son in New Zealand tried to find out what had happened to the motorcycle, which was supposed to have arrived in early February 1990, and had gotten nowhere with Penn-Nordic's agent in New Zealand, he turned to Corporate World for advice. On June 1, 1990, almost two months after Corporate World had paid freight on the Adair shipment to Penn-Nordic's attorney in Pennsylvania and had been advised that Penn-Nordic would forward the Adair shipment and would "waive" storage charges, Corporate World advised Mr. Adair's son, the consignee of the shipment, that Corporate World was unable to obtain release of the motorcycle and that Mr. Adair's son should file a claim for "lost cargo," presumably with the insurance company. Almost two months later, on July 25, 1990, Corporate World advised Mr. Adair's son where the motorcycle could be located but that Corporate World would not be able to pay the storage charges. However, as Mr. Adair states, Corporate World must have known some time in March 1990, if not earlier, that the motorcycle had not been shipped because Corporate World had engaged attorneys in Pennsylvania to resolve various payment disputes with Penn-Nordic.

I find that Corporate World failed to exercise the standard of care and diligence which the law requires of fiduciaries, such as freight forwarders, and that Corporate World failed to observe just and reasonable regulations and practices with regard to the shipment in question, in violation of section 10(d)(1) of the 1984 Act.

Regardless of the problems and financial disputes which existed between Corporate World and Penn-Nordic, Mr. Adair, a totally innocent shipper, should not bear the risk. Mr. Adair entrusted his shipment and money to a skilled agent and fiduciary, the freight forwarder, Corporate World, in December 1989, and now, over one and one-half years later, still has had no relief. It was not Mr. Adair who told Corporate World to do business with Penn-Nordic, an NVOCC who had no tariff on file at the time of the booking of the

motorcycle, and who, even before that time or soon thereafter, showed Corporate World that it was unreliable and that Penn-Nordic shipments might not be released overseas. It is true that Penn-Nordic validated and issued an on-board bill of lading and later disclaimed that document, and that persons coming into possession of such a document were entitled to assume that the motorcycle had been shipped on board as stated thereon. It may be that Corporate World was therefore entitled to rely on the on-board bill and not to make further inquiries in January 1990 or shortly thereafter as to whether the on-board bill was true. However, at some point in time before April 18, 1990, Corporate World had reason to suspect that the motorcycle might not have been carried to New Zealand, or, if so, might not have been released, based on Corporate World's experience with Penn-Nordic. Furthermore, by April 18, 1990, or earlier, Corporate World must certainly have been put on notice that the motorcycle had not been shipped and probably that it had been mishandled by Penn-Nordic. Instead, on June 1, 1990, Corporate World advised the consignee to file a claim apparently with the insurance company for "lost cargo." Also, had Corporate World promptly paid over the freight money entrusted to it by Mr. Adair in January 1990, perhaps Penn-Nordic would not have aborted the shipment in California in the first place. In any event, why should the innocent shipper, Mr. Adair, bear the risk that someone like Penn-Nordic, whom Mr. Adair never selected to handle his motorcycle, might put the motorcycle in a warehouse and encumber the motorcycle with monthly storage charges?

In summary, I conclude that Corporate World, through its own misconduct, helped precipitate the abrupt termination of the shipment and the accrual of unnecessary storage charges and failed to monitor the situation and to assist Mr. Adair and his son properly to release the motorcycle and forward the shipment to New Zealand. According to Mr. Adair,

as long ago as January 23, 1991, Corporate World offered to move the motorcycle to New Zealand at no charge to Mr. Adair and to split storage charges, which Corporate World would try to negotiate downward with the warehouse which was holding the motorcycle. (See Final Comments of Mr. Adair, August 26, 1991.) However, as Mr. Adair states, Mr. Sherwood of Corporate World never got back to Mr. Adair about this offer despite a letter and phone calls which were not answered. (*Id.*) Nevertheless, Mr. Adair states, and I agree, as follows (*Id.* at 2.):

I contend that Corporate World should straighten out this matter--should have aggressively handled it long ago, in fact, and that I should not be obliged to deal with the third parties or absorb any of the cost of correcting this situation.

If Corporate World believes that the primary malfeasor in this sorry story is Penn-Nordic, which aborted the shipment and placed the motorcycle in a warehouse in the first place, this argument should not deprive Mr. Adair of relief from either of the malfeasors. If Mr. Adair chooses to recover his damages from Corporate World by seeking to enforce an order for payment of reparations in a federal court in his home state, let Corporate World seek contribution or indemnification from Penn-Nordic later in a court located in Pennsylvania, if necessary. That is a matter between these two malfeasors. However, Mr. Adair ought not to be bothered with the dispute between the two respondents, and he ought to be given relief as promptly as possible against whichever respondent he chooses. In short, Corporate World was supposed to act as Mr. Adair's trusted and skilled agent and to protect Mr. Adair's interests, but by selecting an unreliable NVOCC, failing to pay freight promptly, and thereafter failing to advise and assist Mr. Adair or to arrange to have the motorcycle released and shipped, Corporate World

failed in its fiduciary obligations to Mr. Adair and should be held fully accountable together with the other respondent, Penn-Nordic. Mr. Adair ought not to be required to pay any more money to anyone to release his motorcycle, but, on the contrary, should be made whole for the injury he has already suffered.

The Amount of Reparations Awarded

Section 11(g) of the 1984 Act, 46 U.S.C. app. sec. 1710(g), provides in pertinent part that the Commission *shall* "direct payment of reparations to the complainant for actual injury . . . [which includes loss of interest] . . . caused by a violation of this Act. . . ." This provision is similar to its predecessor, section 22 of the Shipping Act, 1916, 46 U.S.C. app. sec. 821, except that section 22 gives the Commission discretion to award ". . . full reparation to the complainant for the injury caused by such violation." There is little explanation in the legislative history to the 1984 Act as to why Congress chose the words "actual injury," although the Conference Report to the 1984 Act indicates that section 11(g) serves to "limit damages to the amount of actual injury." (See Conference Report at 41, quoted in *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 SRR 1213, 1230 n. 22 (1990).)

The Commission's predecessors under the 1916 Act have issued numerous decisions which describe the applicable standards for proof of injuries which are compensable under the 1916 Act and, by force of precedent or analogy, under the 1984 Act. The basic principles are those similar to the law of damages as developed in the courts. Thus, proof of injury or damages must rest on reliable evidence that shows that the violation of law was the proximate cause of the damages. In some instances, when precise evidence measuring

financial injury is unavailable because of the nature of the violation, the Commission will rely on reasonable estimations, as do the courts, so that the wrongdoer does not benefit from its misconduct. Alleged damages based on unreliable or speculative evidence are not allowed. The complainant is required to show the fact of injury with reasonable certainty. The Commission has recently restated these principles as they apply to section 11(g) of the 1984 Act in *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, cited above, 25 SRR at 1230. Among the many cases discussing these basic principles of the law of damages, as they have been applied for many years by the Commission in complaint cases, are: *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 SRR 1054, 1058 (1984); *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 SRR 826, 847 (I.D., F.M.C. notice of finality, June 7, 1984); *Ballmill Lumber & Sales Corp. v. The Port of New York Authority et al.*, 11 F.M.C. 494, 510-511 (1969).

In his original complaint, Mr. Adair asks for an award of \$4,623.30, as reparations for the injuries both he and his son have suffered as a result of the misconduct of the respondents discussed above. He itemizes his damages as follows:

\$2,500.00	- cost of the motorcycle
450.00	- interest at 12 percent, based on 18 months of unavailability
50.00	- fee paid to an attorney for consultation
103.30	- transpacific phone calls seeking to locate the motorcycle
995.00	- shipping fees paid
<u>25.00</u>	- Commission's fee for filing the complaint
\$4,623.30	Total

The basic objective of the law of damages in such cases as the instant one is to make a person who has suffered injury whole. Thus, a complainant is compensated for monetary losses or pecuniary injury caused by a violation of law, and the complainant is also awarded interest for loss of the use of his money, as well as attorney's fees, if he is represented by an attorney. As discussed in the cases cited earlier, it is necessary to support alleged items of injury with reliable evidence, not with speculation, and there must be a reasonable nexus between the type of violation and the claimed injury.

Of the seven items of alleged damages listed above, I find support in law and evidence for four of them (cost of motorcycle, consulting fee, phone calls, and shipping fees). The other three items (interest on the cost of the motorcycle, loss of use, filing fee) are not compensable as a matter of law or because of the absence of reliable evidence to support them).¹¹ The four items which do qualify for an award of reparations total \$3,648.30, the amount of the award to Mr. Adair, plus interest, as authorized by section 11(g) of the 1984 Act.

Mr. Adair has furnished a copy of the bill of sale showing that he paid \$2500 for the used motorcycle. By their misconduct, respondents have caused the motorcycle not only not to be shipped to Mr. Adair's son but to have been placed in a warehouse where he is unable to obtain its release, without paying storage charges, assuming it is still there and

¹¹Thus, the \$450 item is the interest on \$2,500, calculated at 12 percent for 18 months, the approximate time the motorcycle has been held in the warehouse. The law already compensates Mr. Adair for "loss of interest at commercial rates compounded from the date of injury." (See section 11(g) of the 1984 Act.) This item of interest will therefore be subsumed in the award of interest for all items and at the rate the Commission usually employs (average monthly rates on six-month U.S. Treasury bills). (See Docket No. 90-29, *Interest in Reparation Proceedings*, September 11, 1991, at 9 n. 5, and at 12.) The \$500 item for loss of use of the motorcycle is "purely subjective," as Mr. Adair quite honestly states. (See his sworn statements, June 5, 1991, at para. 3.) The amount is apparently based on a guess as to what his son and daughter-in-law had to expend to make up for the absence of the motorcycle. The \$25 filing fee is equivalent to a court cost. Under American law, costs are not awarded (nor are attorney's fees) unless there is specific statutory or other authority. Section 11(g) of the 1984 Act does not authorize awards of costs by the Commission (but does authorize awards for attorney's fees.)

has not been sold at auction by now. These respondents have therefore, in effect, "converted" the motorcycle, i.e., they have purchased it. Under an alternative theory, they have delayed shipment, in which event the measure of damages would be the loss in value between the motorcycle had it been delivered properly at destination and the value when it was later delivered. Since it was never delivered, this latter value is zero. Under either theory, Mr. Adair has suffered an out-of-pocket loss of \$2,500.

The \$50 which Mr. Adair paid to an attorney was not paid as "attorney's fees." No attorney has entered an appearance or has represented Mr. Adair. This fee is rather a loss to Mr. Adair of money which Mr. Adair had to expend to obtain advice as to what to do. In other words, it is similar to a cost of research which was made necessary because of the predicament which respondents caused Mr. Adair. (See Exhibit No. 8, the letter to the attorney, confirming the payment of \$50.)

The \$103.30 represents the total cost of phone calls placed by Mr. Adair's son in New Zealand during March, April, May, and June 1990 to Corporate World and Penn-Nordic asking them about the whereabouts of the motorcycle. The figure is converted from New Zealand to American dollars. (See sworn statements of Mr. Adair, June 5, 1991; Exhibit No. 9, which are itemized phone bills.)

The \$995 item represents reimbursement for fees which were incurred for storing and preparing the motorcycle for shipment, plus shipping fees and insurance. This amount was paid to KGM Assemblers. (See original complaint at para. B.f.; see also Exhibit No. 2, which is a copy of KGM's paid invoice.) Because the shipment was never handled properly, all of this money was spent by Mr. Adair for nothing, and he is entitled to reimbursement.

Accordingly, complainant is awarded reparations totaling \$3,648.30, and respondents are ordered to pay this amount, plus an amount of interest to be determined.¹² Complainant, who is not represented by counsel, is advised that if respondents fail to comply with this order of reparations, complainant may seek enforcement in an appropriate United States district court against either respondent. In such court action, complainant is entitled to an award of costs and attorney's fees. (See section 14(d) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1713(d).)

Norman D. Kline

Norman D. Kline
Administrative Law Judge

¹²Interest on each of the items runs from the following dates:

\$2,500.00 - January 14, 1990, the date of receipt of the motorcycle shown on the bill of lading. (See also Mr. Adair's statement, dated June 5, 1991, at para. 1.)

\$50.00 - January 23, 1991, the date of payment of this fee. (See Exhibit No. 8.)

\$103.30 - These phone calls were billed on four different monthly statements, and the New Zealand dollar amounts have been converted to U.S. dollars and rounded off to two decimal places as follows: \$24.48, from April 19, 1990; \$35.90, from May 17, 1990; \$31.01, from June 25, 1990; and \$11.90, from July 19, 1990. (See Exhibit No. 9.)

\$995.00 - December 8, 1989, the date of payment of these shipping fees. (See Exhibit No. 2.)

If the Commission affirms this initial decision after review on request of any party or on the Commission's own motion under 46 CFR 502.318, the Commission will calculate the amount of interest and issue an announcement. (See 46 CFR 502.253.)